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ANALOGY BETWEEN CERTAIN RESTRICTIVE COVENANTS OR CONTRACTS, AFFECTING LAND, AND NEGATIVE EASEMENTS.

Where an owner of land (or other immoveable property) has entered into a restrictive covenant or contract, affecting that land, with an owner of other land, *as such*, and, by virtue of the doctrine of *Tulk* v. *Moxhay*, [1] the burden and the benefit of the covenant pass to the respective transferees of the former and the latter land, the legal relation between the covenantee and the covenantor so created bears an obvious resemblance or analogy to that of a negative easement, though the two relations are by no means wholly identical. The covenant creates, indeed, an equitable burden attaching to the covenantor's land, (*L. & S. W. Ry. Co.* v *Gomm*[2]) but the burden is liable to be removed, and the right of the covenantee or his transferee to enforce it to be defeated, if the covenantor's land be transferred to a purchaser for value without notice of the covenant, and such purchaser has acquired the legal estate; whereas, in the case of an easement, when once the easement is created, the burden on the servient owner passes to all transferees of the servient tenement, whether they be transferees with or without notice of the existence of the easement.

It is true, in some cases a restrictive covenant affecting land, may, upon the true construction of the instrument, operate as a grant of an easement. In his judgment in *Russell* v. *Watts* [3] Lord Blackburn said : "I take it to be clear that

1. (1848) 11 Beav., 571 : 2 Phillips, 774; 1 Hall & Tw., 105; 18 L. J., Ch., 83; 39 W. R., 547. The doctrine had been recognised and acted upon in previous cases; see the judgment in *Tulk* v. *Moxhay*.

2. (1881) L. R. 20 Ch. D. 562 at p. 583.

3. (1885) L. R. 10 A. C. 590 at p. 611.

any form of words which, when properly construed with the aid of all that is legitimately admissible to aid in the construction of a written document, indicate an agreement, forms when under seal, a covenant, and that a covenant may, if it is necessary in order to carry out the intention, operate as a grant." Speaking, just before, of the doctrine of the creation of the negative easement of access of light to a window by a presumed lost instrument, he said [1]: "All authorities agreed that an instrument might have been made, having such an effect. Some seem to have thought it must have been a covenant on behalf of the then owner of the land not to obstruct the window (see per FRY J., *Angus* v. *Dalton*[2]); some that it might have operated as a grant by the owner of the land of a window on the adjoining land, and that neither he nor those who claimed under him could derogate from his grant by obstructing it." In *Dalton* v. *Angus*, BOWEN J. said[3]: "The form in which the presumption built upon a twenty years' enjoyment has usually been framed is that of a lost grant or covenant, according as the right claimed is to an affirmative or a negative easement." And, in the same case, FRY J., speaking of the easement, which had been generally regarded as a negative easement, of right of support to a building by the land of an adjoining proprietor, said (the passage alluded to by LORD BLACKBURN in the above quotation): [4] "The right being, not to a thing to be done or used in the neighbour's soil, but to a limitation of the user of that soil by the neighbour himself, does not lie in grant, but would be created by a covenant by the neighbour not to use his land in any manner inconsistent with the support of the adjoining buildings (see the judgment of LITTLEDALE J. in *Moore* v. *Rawson*[5]) and such a covenant might either be express or might be inferred from the object and purport of the instrument, as in *Caledonian Railway Co.* v. *Sprott* [6]." The question whether a

1. (1885) L. R. 10 A. C. 590 at pp. 610, 611.

2. (1881) L. R. 6 A. C. 740 at p 771.

3. (1881) L.R. 6 A. C. at p 782. See also *Hall* v. *Lichfield Brewery Co.*, (1879-1880) 49 L. J. Ch., 655; as to which case, however, see *Cable* v. *Bryant*, (1908) 1 Ch. 259, 263, in which *Neville* J. held that an easement of access of air to a window could be the subject of a *grant*, express or implied. See also opinion of *Lord Selborne* L. C. in regard to easements of light or of air in *Dalton* v. *Angus*, (1881) L. R. 6 A. C. at p. 794.

4. (1881) L. R. 6 A. C. at p. 771.

5. (1824) 3 B. & C. 332, 340.

6. (1856) 2 Macq. 449.

covenant imposing on the covenantor some restraint concerning land belonging to him, in favour of an owner of other land, operates to create an easement, or only to create an equitable burden attaching to the covenantor's land,—a burden which will cease to attach thereto in the event of acquisition of the legal estate by a purchaser thereof for value without notice,—depends upon the construction to be put on the covenant, in the instrument in question in each case. In some cases the determination of the question, difficult and doubtful on the face of the covenant itself, may be aided or settled by language in some other part or parts of the instrument. In some cases, again, the very nature of the restriction, according as it is one which is, or on the other hand is one which is not, involved in some easement well known to the law, may be the determining factor in the conclusion to be come to as to the intendment.

Restrictive covenants or contracts such as have been referred to, which do not operate to create easements, form the subject-matter of the first and last paragraphs of S. 40 of the Indian Transfer of Property Act, and are also referred to in S. 11 of that Act. But no reported cases thereunder are, so far as the writer is aware, as yet to be found.

The doctrine of *Tulk* v. *Moxhay* has been regarded as an extension either of the doctrine of covenants running with land or of the doctrine of negative easements. In *L. & S. W. Railway Co.*, v. *Gomm* [1] JESSEL M. R. said : "The doctrine of that case" (*Tulk* v. *Moxhay*), "rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case*[2] to another line of cases, or else an extension in equity of the doctrine of negative easements ; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk* v. *Moxhay* was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an

1. (1881) 20 Ch. D. 562 at p. 583. 2. (1583) 5 Co. Rep. 16 a ; 1 Sm. L. C. 55.

exception to the rules of Common Law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." This passage in the judgment of JESSEL M. R. in that case was relied on and followed by the Court of Appeal in *Rogers* v. *Hosegood*[1] by VAUGHAN WILLIAMS L. J. in his judgment in the Court of Appeal in *Formby* v. *Bar kcr*[2] with which the other Lords Justices agreed; and by the Court of appeal in *Nisbet and Potts' Contract, In re*[3]. In his judgment in the last mentioned case COLLINS M. R. referred to the view of JESSEL M. R. expressed in *L. & S. W. Railway Co.* v. *Gomm* as being "that an obligation created by a restrictive covenant is in the nature of a negative easement, creating a paramount right in the person entitled to it over the land to which it relates."[4] And COZENS-HARDY L. J. (now M. R.) in his judgment in the same case said: "The benefit of a restrictive covenant of this kind is a paramount right in the nature of a negative easement[5]"; and, again: "this covenant, which is in the nature of an equitable easement[6]."

In order that this doctrine should be applicable, it is essential that the restrictive covenant should be one which "touches and concerns" the land of the covenantor and not a mere personal and collateral contract. And also the covenant must be entered into with the covenantee as owner of some other land and for the benefit of that land, or, in other words, for his benefit and that of his successors in title as owners of it, otherwise the benefit of the contract will not pass to the covenantee's transferee. These propositions have been affirmed in *Rogers* v. *Hosegood*,[7] *Formby* v. *Barker*,[8] *McLean* v. *McKay*,[9] *Mann* v.

1. (1900) 2 Ch. at pp. 404, 405.
2. (1903) 2 Ch. at p. 552.
3. (1906) 1 Ch. 386, 402—406.
4. (1906) 1 Ch. 386 at p. 402.
5. (1906) 1 Ch. at p. 409.
6. (1906) 1 Ch. 499.
7. (1900) 2 Ch 388 at p. 407.
8. (1903) 2 Ch. 539, 552, 554.
9. (1873) L. R. 5 P. C. 327.

Stephens,[1] and other cases. Notwithstanding, however, the authority which exists, and to which reference has been made, for regarding such restrictive covenants as those under consideration as being in the nature of negative easements, it has been held that where a restrictive covenant affecting the user by the covenantor of certain land belonging to him has been entered into for the benefit of the covenantee merely in his (the latter's) personal capacity and not in his capacity as owner of some land, the covenantee himself is entitled to enforce the covenant against a transferee of the covenantor's land who purchased it from him with notice of the covenant; in other words, such suit is maintainable although there is no *quasi*-dominant tenement.[2] But the covenantee cannot assign the benefit of such a covenant so as to entitle the assignee to the benefit of it.[3]

It is, indeed, obvious, from the nature of an easement, that if the doctrine of *Tulk* v. *Moxhay* be regarded as an extension in equity of the doctrine of negative easements, the restrictive covenant must be one which "touches and concerns" the land, both the land of the covenantor in respect of which the covenant imposes a burden and the land of the covenantee in respect of which it creates a benefit. But it holds equally good that the covenant must touch and concern the land, if the doctrine be regarded as an extension by the Court of Equity of the Common Law doctrine of covenants running with the land. As laid down in *Spencer's Case*[4], a covenant cannot run with the land (*i.e.*, the burden or the benefit of it, respectively, pass to the covenantor's or the covenantee's successor in title to the land) if it "doth not touch or concern" it. In his judgment in *Rogers* v. *Hosegood*,[5] after observing that it is an essential characteristic of covenants which run with the land that they must "touch and concern" the land, FARWELL J. (now L. J.) adopted the definition of that

1. (1846) 15 Sim., 377 : 60 E.R. 665.

2. *Osborne* v. *Bradley*, (1903) 2 Ch. 466. And see *Catt* v. *Tourle* (1869) L.R. 4 Ch. App. 654 ; *Doherty* v. *Allman*, (1878) L. R. 3 A. C. 709, 719. See also observations of *Stirling* L. J. at the end of his judgment in *Formby* v. *Barker*, (1903) 2 Ch. at p. 556.

3. *Formby* v. *Barker*, L. R. (1903) 2 Ch. 539, 554.

4. (1583) 5 Co. Rep. 16 a : 1 Sm.L. C. 55.

5. (1900) 2 Ch. at p. 395. See also *Horsey Estate, Ld.* v. *Steiger*, (1899) 2 Q. B. at p. 89 (per Lord Russell of Killowen, L. C. J.).

expression given by BAILEY J. in *Congleton Corporation* v. *Pattison*[1] that "the covenant must either affect the land as regards mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land." The Court of Appeal, in *Rogers* v. *Hosegood*,[2] confirming the judgment of FARWELL J., held that, where *A*, the owner of some plots of land, sold one plot to *B*, and *B*, in the deed of conveyance of that plot, covenanted with *A*, his heirs and assigns, that not more than one dwelling-house should be built on that plot, and that such dwelling-house should be adapted as and for a private residence only, and that no trade or business should at any time be carried on in or on that plot, this covenant was one which benefited the owner of the remaining plots, as such, in that it increased their value, and that, therefore, it was a covenant annexed to those plots and the benefit of it ran with them. And in the judgment of the Court of Appeal delivered by COLLINS L. J., after quoting passages from the judgment of JESSEL M. R. in *L. & S. W. Railway Co.* v. *Gomm*,[3] the Court said[4]: "These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land." And after referring to passages in the judgment of HALL V. C. in *Renals* v. *Cowlishaw*,[5] and of WOOD V. C. in *Child* v. *Douglas*,[6] the Court of Appeal, speaking of the benefit of a restrictive covenant, said:[7] "These authorities established the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought

1. (1808) 10 East, 130, 135.
2. (1900) 2 Ch. 388.
3. (1881) 20 Ch. D. 562 at pp. 580, 583.
4. (1900) 2 Ch. at p. 405. 406.
5. (1878) Ch. D. 125 at p. 130; affirmed on appeal, (1879) 11 Ch. D. 866.
6. (1854) Kay, 571; 5 D. M. & G. 739: S. C. 43, E. R. 1057.
7. (1900) 2 Ch. at p. 407.

something which inhered in or was annexed to the land bought."

In *Austerberry* v. *Corporation of Oldham*[1] the covenant, entered into by the owners in fee of a piece of land, was not a restrictive covenant, but a covenant to do something, *viz.*, to make a road on that piece of land and keep it in repair, but the ground on which the Court of Appeal held that the benefit of the covenant did not run with the adjoining land, in respect of which the plaintiff claimed that it did, was the same, *viz.*, that the covenant (as the Court found on a consideration of the deed in which it was contained) was not one which had been entered into with the covenantee in his capacity as owner of that adjacent land or for his benefit as such owner.

In *Rogers* v. *Hosegood*[2] it was held that if the restrictive covenant touches and concerns the land of the covenantee, the benefit of the covenant runs with the land, whether the assignee at the time of the transfer of the land to him knew of the existence of the restrictive covenant or was ignorant of it, unless the instrument of transfer expressly or impliedly negatives an intention to pass to him the benefit already annexed to the land. In that case there was no evidence that the covenantee's assignee knew of the restrictive covenants in question in the case when he purchased the land.

But in the case of a burden of the restrictive covenant, on the other hand, it is necessary that the covenantor's assignee, if the transfer to him of the land has been in due course of law completed, so that he has acquired the legal estate, should have had, when he became assignee of the covenantor's land, notice, either express or implied, of the covenant, otherwise the doctrine of *Tulk* v. *Moxhay* does not render him liable to the burden of the covenant, notwithstanding that it be one which touches and concerns that land[3]. It seems to be the better opinion that the burden of a restrictive covenant affecting land, in cases where the covenant is entered into by an owner of land, as such, (which are the cases now under consideration, not cases of covenants

1. (1885) 29 Ch. D. 750, at pp. 780, 781.

2. (1900) 2 Ch. at pp. 403, 404, 408.

3. *Tulk* v. *Moxhay*, (1848) 18 L. J., Ch., 83; and reported in other Reports (see footnote at p. 291).

between landlord and tenant) never runs with the land at law.[1] But the doctrine of *Tulk* v. *Moxhay* does not depend upon the question whether the covenant is one which runs with the land at law. In that case LORD COTTENHAM, L. C., in his judgment said[2] : " Now I do not apprehend that the jurisdiction of this Court is fettered by the question whether the covenant runs with the land. The question is whether a party taking property, the vendor having stipulated in a manner binding by the law and principles of this Court to use it in a particular way, will be permitted by this Court to use it in a way diametrically opposite to that which the party [3] has covenanted for." [The defendant, the then owner of the land, upon which the covenant entered into by the original purchaser thereof had imposed the burden, admitted that he purchased it with notice of that covenant.]

It was admitted in *Nisbet and Potts' Contract, In re*[4] that a volunteer assignee of the land on which the burden of a restrictive covenant has been imposed, who has acquired the legal estate therein, is bound by the covenant, whether he had notice of the covenant or not. The equitabe right of the covenantee and his assigns under the doctrine of *Tulk* v. *Moxhay* cannot be defeated by the covenantor's assignee on the ground that he had no notice of the covenant, unless he not only has acquired the legal estate but also was a purchaser for value. And a person who has acquired a title to the covenantor's land by adverse possession under the Statute of Limitations for the statutory period is in the same position as an alienee under a voluntary assignment, in so far that he is not a purchaser for value. But it was contended, in *Nisbet and Potts' Contract, In re*, [5] that by such adverse possession not only was the covenantor's title to the land extinguished but also the right of the covenantee (or his assign) under the restrictive covenant. But the Court of Appeal, as well

1. *Austerberry* v. *Corp. of Oldham*. (1885) L. R. 29 Ch. D. at p. 781; *Rogers* v. *Hosegood*, (1900) 2 Ch. at p. 395..

2. (1848) 18 L J., Ch.83. See also *Johnston* v. *Hall*, (1856) 2 K. & J. 414 at p. 422 : 69 E. R. 844 (847) (per *Lord Hatherley*). And see *Wilson* v. *Hart*, (1866) L R. 1 Ch. App. 463.

3. The word "party." on this second occasion of its use in this same sentence, refers to the assignor (who was the covenantor), though on the first occasion it (unfortunately) is used in reference to his assignee.

4. (1905) I Ch. 398, 399 ; (1906) 1 Ch. 394. 395. 403, 406.

5. (1905) 1 Ch. 391 ; (1906) 1 Ch. 386.

as the Court of first instance, held that the covenantee's (and his assigns') right remained equally unaffected by the adverse possessor's acquisition of such title to the land as is acquirable under the statute as would the dominant owner's rights have remained unaffected thereby if the land had been up to the time of the commencement of the adverse possession subject to a negative easement. The only persons whose right and title the statute purports to extinguish are those whose rights are necessarily affected by the adverse possession, and who have consequently a right of suit for recovery of possession or otherwise; but to the covenantee it is immaterial who is in possession of the land, so long as there is no breach of the restrictive covenant: the adverse possession does not of itself affect the covenantee's right or give him any right of action [1].

It has to be borne in mind that a restrictive agreement or promise could not in any case operate as a grant of an easement, under the English law, unless the agreement or promise were a covenant, that is, were contained in an instrument in writing under seal [2]; whereas an agreement, though not under seal, may, it would appear, be one to which the doctrine of *Tulk* v. *Moxhay* will apply, as much as a covenant. In that case the LORD CHANCELLOR said in his judgment[3]: "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the VICE CHANCELLOR of England, in which he considered that doctrine as not in dispute, but, looking at the ground on which LORD ELDON disposed of the case of the *Duke of Bedford* v. *The Trustees of the British Museum*,[4] it is impossible to suppose that he entertained any doubt of it." In regard to cases in India, a restrictive

1. Stat. of Limit. (3 & 4 Will. IV, C. 57) S. 34; L. R. (1906) 1 Ch. at, pp. 401, 402.

2. An express grant of an easement can only be made by instrument under seal by that law. See "The law of Easements," &c., "in India", 2nd Ed. by R. B. Michell, p. 46. The word "grant" does not include a testamentary gift

3. (1848) 2 Phillips, 774.

4. (1822) 2 My. & K 552.

agreement or promise affecting land could not, even though in terms construable as shewing an intention to create an easement, operate as a grant of an easement, in any part of India to which the Transfer of Property Act applies, unless made in a registered instrument, because S. 54 of that Act requires that every transfer by way of sale of intangible immoveable property shall be made by registered instrument, and "intangible immoveable property" apparently includes (*inter alia*) easements, and by S. 123 of that Act a transfer by way of gift of "immoveable property" must be made by a registered instrument, and "immoveable property" must include both "tangible" and "intangible" immoveable property [1].* A case might, however, perhaps be imaginable in which a restrictive promise or agreement might operate to create an easement by way of lease, notwithstanding that it were not contained in a registered instrument. If such a promise or agreement, not contained in a registered instrument, were that, in consideration of a monthly rent, the promisor will abstain, for a period of one year, from creating any building on that part of his land which is within a certain distance of a wall of the promisee's house having windows overlooking that land, this would seem to be capable of being construed as a valid transfer by way of lease of an easement of light for a limited period,[2] inasmuch as a lease of "immoveable property" for a term not exceeding one year is not required by the Transfer of Property Act to be made by registered instrument[3].

R. B. MICHELL.

NOTES OF INDIAN CASES.

Janakdhari Lal v. Gossain Lal Bhaya Gaywal.—I. L. R. 37 C. 107.—We think the question raised in this case, of the effect of a sale held in execution of a decree which has been satisfied and the satisfaction of which has been certified to the Court, requires further consideration The decision

* [NOTE.—A Bench of the Allahabad High Court has in a recent case held that the *creation* of an easement need not necessarily be by a registered instrument.—See *Bhagwan Sahai* v. *Narsingh Sahai*, (1909) I. L. R. 31 A 612.—ED.]

1. See "The Law of Easements", &c. "in India," 2nd ed., by R. B. Michell, p. 46 ; also "The Indian Transfer of Property Act" by Sir H. H. Shephard & Mr. K. Brown, commentary on S. 54.

2. See Easements Act, S. 6.

3. See Transfer of Property Act, S. 107.

in the case might be supported on the ground that the sale was made in pursuance of a certificate under the Public Demands Recovery Act, and according to that Act the officer concerned would have no jurisdiction to sell when the demand in respect of which the certificate was issued has been satisfied. In the case of a decree of the Civil Court the decisions in the Indian Courts are conflicting.

The observations of Sir *Barnes Peacock* in *Rewa Mahton* v. *Ramkishen Singh*[1] are inconsistent with the view taken by the learned Judges in this case. "A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court had jurisdiction a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." It cannot be said that the effect of satisfaction on payment into Court, upon a judicial sale held in pursuance of an order of the Court despite such satisfaction or without an advertence to the same, can be greater than that of one under S. 246 which declares that there shall be a statutory satisfaction under certain circumstances. In the case before the Privy Council the sale had been held by the Court in contravention of the provisions of S. 246. Nevertheless the Judicial Committee held that the purchaser got a valid title. If satisfaction is made out of Court and such satisfaction is not certified to Court, the executing Court cannot take notice of such satisfaction and there can therefore be no question as to the validity of the judicial sale. It is only when there is payment made into Court and satisfaction which an executing Court can take judicial notice of, that any question as to the validity of a judicial sale can arise. It is only with reference to such circumstances that Sir *Barnes Peacock* states in the case already cited, that a purchaser is not bound to inquire

1. (1886) I.L.R. 14 C. 18.

whether a judgment upon which execution issues has been satisfied or not.

Bhupati Nath Smriti Thirtha v. **Ram Lal Maitra.**—I.L.R. 37 C. 128.—After a series of decisions the other way the Calcutta High Court has at last come to take the sensible view that the doctrine in the *Tagore case* that a gift to an unborn person is void—a doctrine in itself doubtful under the Hindu Law, at any rate under the *Mitakshara*—is not applicable to a gift for the establishment of an image and to the worship of the Hindu deity. Mr. Justice *Mukherjee* sums up correctly the effect of the decisions and refers to the texts of the Hindu Law in Support of his view.

Raghunathji Tarachand *v.* **The Bank of Bombay.**—I. L. R. 34 B. 72.—We are not sure as to the soundness of the decision in this case, and some parts of the reasoning by which the conclusion is reached seem to us open to question. The point raised is as to the liability of a minor member of a joint Hindu family carrying on an ancestral trade, in respect of pro-note debts contracted by the managing member in the firm name but not for the firm's purposes. Taking it that it was in the 'usual course of the business' for the manager to contract debts, the learned Judges hold that the minor's share will be liable quite independently of the application of the money borrowed and of any question of necessity real or accredited. It is admitted that there is no previous decision on this particular point but certain dicta are referred to by *Chandavarkar* J. as supporting the above conclusion and the learned Judge adopts them as also being in consonance with certain texts of Hindu Law. Reference is also incidentally made to the necessity of such a rule in the interests of family trades.

Mr. Justice *Batchelor*, after referring to the previous decisions as to the nature and incidents of family trades, holds that they justify the application to such cases of the law of partnership as distinguished from the law relating to the manager's power of alienation. The learned Judge relies on S. 247 of the Contract Act which he says is not in conflict with any text of Hindu Law.

With due deference, it is submitted that the legal nature of a Hindu family firm as hitherto understood does not warrant

the application to it of the rule of "apparent authority" as known in the ordinary law of partnership.

As rightly pointed out by *Batchelor* J. the question is not what *ought* to be the law in the interests of family trades. It is true that there is a certain resemblance between an ordinary partnership and a joint family carrying on an ancestral trade (cf. *Sokkanadha* v. *Sokkanadha*[1]. But the essential difference between the two is, that the latter does not rest on any theory of *contract* between the members. (Cf. *Bishambar Nath* v. *Fateh Lal*[2]). The rule of 'apparent authority' which in the law of partnership rests not merely on the exigencies of trade but on the contractual relation of *mutual agency* between the partners (see S. 5 of the English Partnership Act and the passage from *Story* cited in *Bank of Australasia* v. *Breillat*[3]) is therefore inapplicable to such cases. The managing member, as much in a trading family as in an ordinary family, owes his position as such to his *status* and not to any contract, and the rights and powers incidental to such position would, it is submitted, be governed by the rule in *Hanooman Pershad's case* as much in the case of a trading family as in the case of an ordinary family. The only effect under the Hindu Law of the trade being an ancestral one, is that the managing member is entitled to continue it, on behalf of the family, independently of any authorization by the other members (for the rule of the Muhammadan Law, cf. *Abdul Khader* v. *Chidambaram Chettiar*,[4]) and though unauthorized he is, for the purpose of such trade, but not for a *new* business, (Cf. *Maclaren Morison* v. *Verschoyle*[5]) entitled under the law to bind the family property, just as he can do in managing any other kind of family property. The proposition of *Chandavarkar* J. that in such cases the 'trade purpose' must be regarded as a 'family purpose' cannot carry us any further than this.

The case before them being one of a minor, in which no question of personal liability arose, the learned Judges do not seem to have sufficiently realised the anomalies to which the application of the broad rule enunciated by them would logically lead. If the other members of the family were adults, the

1. (1904) I.L.R. 28 M. 344. 2. (1906) I.L.R. 29 A. 176.
3. (1847) 6 Moo. P. C. at p 193. 4. (1908) I.L.R. 32 M. 276.
5. (1901) 6 C.W.N. 429.

application of the principles relating to ordinary partnerships as distinguished from the Hindu Law relating to the manager's powers, would involve the personal liability of such members in respect of the manager's trade debts ; and it would also follow that persons other than the manager could incur binding debts in the name of the firm. This has never been known to be the law, and it would not be possible to support such a proposition. It is then difficult to see whence the learned Judges would derive a rule of 'apparent authority' not quite of the same nature as that known in the law of partnership but restricted only to the managing member and limited in its operation to the *property* of the family. . . . . . .

We are also unable to agree with some of the observations of *Batchelor* J. with reference to S. 247 of the Contract Act. It must be owned that the principle underlying the section is inconsistent with the now settled view that a minor's contract is absolutely void and not merely voidable. It may be that in a case to which the section directly applies Courts in India must nevertheless give effect to it, but joint family firms are not partnerships within the meaning of the Contract Act, and Courts in India are therefore under no obligation to apply S. 247 to such cases.

As for the passages cited by *Chandavarkar* J. from the Hindu Law books we are unable to see that they throw any light on the question of 'apparent authority' as distinguished from necessity real or accredited. We gladly welcome every endeavour to ascertain and apply the true principles of the Hindu Law but we must be pardoned for expressing our opinion that attempts to read modern ideas into vague passages in ancient text books will be productive of more harm than good.

SUMMARY OF ENGLISH CASES.

Ellis *v.* Kerr. [1910] 1 Ch. 529.

Contract with oneself—Contract by A, B and C with B, C and D as trustees—Void—Basis of the rule permitting one co-covenantee to sue.

A man cannot make a contract with himself. Applying this principle, it was held by *Warrington* J. in this case that a contract by *A*, *B* and *C* with *B*, *C* and *D* as trustees was absolutely

void and gave rise to no sort of obligation, legal or equitable. His Lordship also observed that the objection was one of substance and not of form, and that it bore no analogy to the case of one of the joint promisees being allowed to sue making the others co-defendants. It rests, according to his Lordship, upon the principle that if a covenant to pay a sum of money is made with two persons jointly, each of them is a trustee for the two and for the other, and if one as such trustee refuses to join in the action which in all honesty he is bound to bring for the benefit of his co-covenantee, then his co-covenantee is entitled to make him a party to the action in order that he may be bound and to recover the money secured by the covenant.

In re **A. Boynton, Ld : Hoffmann** *v.* **A. Boynton, Ld.** [1910] 1 Ch. 519.

Debt borrowed by receiver in debenture-holder's action—First charge—Priority.

" When the Court has taken the administration of an undertaking into its own hands (by means of an officer appointed to manage the undertaking) and finds it proper to procure money in order that the undertaking may be preserved or carried on to greater advantage with a view to ultimate realisation, whether the person who finds the money is an outsider or a party to the action, no personal liability is contemplated in either case, the only right of the lender being to have repayment out of the proceeds of the undertaking as and when realised. He can neither sue, nor stop the business by virtue of his charge, nor could he deprive the officer of the Court of his proper demand for work done and services rendered in the course of carrying on and winding up of the business." It was accordingly held in this case that the petitioner-bank who lent the money to a receiver appointed in a debenture-holder's action with a first charge on the undertaking, the deed making no express exemption in favour of the receiver from personal liability, was postponed in respect of its debt to the plaintiff in respect of his costs in the action as well as to the receiver in respect of his remuneration. The claim on the part of the bank to be subrogated to the right of indemnity possessed by the receiver was repelled on the ground that such

right arose only if the receiver had personally undertaken to pay the money and not otherwise.

In re **Edwards: Lloyd** *v.* **Boyes**. [1910] 1 Ch. 541.

"Refuse or neglect"—Capacity of minor—Condition subsequent.

Where a testator directed that in case any person who should become entitled in possession under his will, should refuse or neglect within six months to bear his name and arms, the limitation in his favour should determine: *Held*: the use of the words "refuse or neglect" made the clause inapplicable to an infant as those words involve the exercise of a discretion which in law—special exceptions apart—is impossible for the infant. It was also held that in this matter no distinction could be made between an infant of tender age and other infants.

Worthington & Co., Ld. *v.* **Abott.** [1910] 1 Ch. 588.

Consent order—Effect of—Puisne incumbrancer consenting to foreclosure—Action on covenant—Notice, sufficiency.

A puisne incumbrancer, who voluntarily submits to an order absolute being made in a foreclosure action brought by a prior incumbrancer without insisting upon his right to have the accounts taken and a time allowed within which to redeem the prior mortgage, does not thereby preclude himself from suing on the personal covenant. Where the order is one passed upon consent to which the mortgagor also is a party, it is as if all the parties are putting their hands to an agreement which must be treated as embodying the terms to which all assent and all are bound, and the mortgagor is precluded from contending that he is discharged from liability on the covenant by reason of the mortgagee consenting to such an order.

A further question in the case was whether an oral demand to the mortgagor was sufficient compliance with the provision for notice in the mortgage deed contained in the following words, *viz*, "the mortgagor should pay upon demand in writing by the company, or upon demand in writing signed by any person or persons on behalf of the company, left at a public house belonging to the mortgagor." *Held*: it was.

Green *v.* **Howell.** [1910] 1 Ch. 495.

Partnership—Clause authorising expulsion—Preliminary notice.

A deed of partnership provided that in the event of either partner committing a breach of the partnership articles the other partner might, on notice in writing, terminate the partnership with liberty to the expelled partner to have the question tried by arbitration *Held*: the clause as to arbitration dispensed with the necessity for a preliminary notice to the offending partner giving him an opportunity to explain.

In re **Page: Hill** *v.* **Floodgate.** [1910] 1 Ch. 489 (C.A.)

Interlocutory order—Order dismissing suit as "vexatious or frivolous."

It was held in this case [*Buckley* L. J. with considerable doubt] that an order dismissing a suit as frivolous or vexatious was, for the purposes of appeal, an interlocutory order.

In re **Whiteley: Bishop of London** *v.* **Whiteley.** [1910] 1 Ch. 600.

Charitable trust—Decision of majority binding minority—Administrative detail—Selection of site.

The rule laid down in *Wilkinson* v. *Malim*, *viz.*, that in the administration of public trusts the act of the majority of the trustees is to be treated as the act of the whole body, applies equally to charitable trusts not only when the act is one in which the public or the particular members of the public affected by the trust have a direct interest but also in matters of administrative detail affecting such trusts, for instance, the selection of a site for a poor home directed to be built by a will.

Morgan *v.* **Jeffreys.** [1910] 1 Ch. 620.

Proviso against redemption for 28 years—Bad as a clog on redemption.

A proviso in a mortgage prohibiting redemption by the mortgagor for a period of 28 years with no corresponding prohibition against the mortgagee calling in the money is bad as a clog on the equity of redemption and as such unenforceable.

Humphries v. Humphries. [1910] 1 K. B. 796.

Res judicata—Suit for rent—No plea of Statute of Frauds—Subsequent suit for rent—Bar to such plea.

In a previous suit for rent the defendant only pleaded that there was no completed contract of lease but did not raise the plea that even if there was one it was void under the statute of frauds. After the suit was decreed a second suit for subsequent rent was filed. *Held* that the defendant was barred by *res judicata* from raising the plea based on the Statute of Frauds, as no new facts that came into existence after the first suit had to be urged but only inferences from facts which existed even at the time of the first suit.

The King v. Frederick Moor. [1910] 1 K. B. 818 (C. Cr. A).

Children Act 1908 (8 *Edw.* 7, *C.* 67) *S.* 17—*Encouraging seduction—Meaning of.*

S. 17 of the Children Act 1908 (8 Edw. 7, C. 67) ran as follows:—If any person having the custody, charge or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he shall be guilty of a misdemeanour, etc. *Held* that the word 'seduction' in this section coming as it is in conjunction with prostitution meant only inducing the girl to surrender her chastity for the first time and that a father who encourged the immoral conduct of his daughter with another on occasions subsequent to the first was not guilty under the section for encouraging on such occasions.

Morris v. Carnarvon County Council.
[1910] 1 K.B. 840 (C.A.)

Negligence—Child—School premises in dangerous condition—Liability of school authority.

The facts of this case are given in p. 114 of XX M. L. J. Disapproving the opinion of *Phillimore* J. and confirming the opinion of others and following the judgment of *Ching* v. *Surrey County Council* [1] (for which *vide* XX M.L.J., p. 262) the liability of the school authorities for the injury to the child was affirmed by the Court of Appeal.

1. (1910) 1. K. B. 736.

Stubbs *v.* Slater. [1910] 1 Ch. 632 (C. A.)

Mortgage by deposit of shares—Implied power of sale—Notice—Mistake in the amount, effect of—Principal and agent—Secret profit.

(1) In all cases of mortgage by deposit of shares, there is an implied power to sell ; if no time is fixed, upon giving reasonable notice.

(2) And unlike the case of a pledgor and pledgee, any mistake as to the amount due would not destroy the effect of such notice.

(3) The rule which prohibits an agent from making a secret profit does not apply to the case of a stock broker who includes a small and reasonable commission in the charges which he makes, without mentioning it to be such, when the party dealing knows fully well that those charges include the commission. Under such circumstances even, if such charges should be disallowed, the broker would on the principle of *ua ntum meruit*, be entitled to a fair remuneration for service done.

In re **Freeman : Hope *v.* Freeman.**
[1910] 1 Ch. 681 (C.A.)

Implied revocation—General direction to substitute name—Effect of.

A testator appointed by his will one *B.N.* as his executor, and also by a later clause gave him a share in the residue. Subsequently, by a codicil he, after expressly cancelling his appointment as an executor, added a clause saying that his will was to take effect as if the name of his newly appointed Executor were inserted in his will throughout instead of *B. N. Held* : on a construction of the will this direction did not operate as an implied revocation of the gift of the residue.

Willimot *v.* London Road Car Company.
[1910] 1 Ch. 754.

Landlord and Tenant—Covenant not to sublet without consent—" Responsible person "—" Company " not included.

The covenant in a lease was that the lessee was not to assign or sublet or part with the possession of the premises without the written consent of the lessee which was, however, not

to be withheld "from a respectable and responsible person" *Held*, that a limited Company. however solvent, would not come within the term "responsible" person.

Mathews v. Smallwood. [1910] 1 Ch. 777.

Lease—Construction—Patent ambiguity—Forfeiture—Relief against—Before the Conveyancing Acts and after—Waiver.

This case is good for the following propositions:

(1) As between the habendum and the reddendum in a lease, the former being the dominant part is to prevail against the latter.

(2) As between the lease and counterpart, the lease being the principal document is to prevail.

(3) But where there is a patent ambiguity in the lease, the ambiguity may be cleared by a reference to the counter part.

(4) The right to re-enter on a forfeiture in the case of a lease is a legal right which apart from release or abandonment or waiver can be exercised at any time within the period fixed by the statutes of Limitation.

(5) The onus of proving such waiver, abandonment or release is upon the lessee defendant that sets up such defence.

(6) Waiver can occur only where the lessor, with the knowledge of the facts upon which his right to re-enter arises, does some un-equivocal act recognising the continuing existence of the lease. If, knowing of the breach he does distrain or does receive the rent he waives the breach and nothing which he can say by way of protest will avail him anything. But from the mere fact that the lessee-defendant proves an unequivocal act of recognition, the onus is not shifted on to the lessor to shew want of knowledge.

(7) Prior to the Conveyancing Act, 1881, the only breach of covenant against which equity relieved as a matter of course was the failure to observe the covenant for payment of rent. In no other case did equity relieve unless there was something additional in the nature of accident or mistake; carelessness could under no circumstances be considered to be a mistake or accident so as to afford ground for relief. In cases coming under the Conveyancing Act relief is given, except when the breach is a

breach of a covenant not to assign or underlet, irrespective of any question of negligence. The same rule does not apply however to cases coming within the Conveyancing Act of 1892 which enables the Court to give relief to under lessees even when there has been a breach of the covenant not to underlet.

In re **Royal Naval School : Seymour v. Royal Naval School.** [1910] 1 Ch. 806.

Corporation—"Any person"—Management of Naval School—Infant excluded.

The question in this case was whether an infant could be the member of a corporation created by an Act of Parliament for the management of a naval school. The Act provided generally that any person who should pay the subscription should be a member. *Held* by *Eve* J., on the authority of *Rex* v. *Carter*[1], that the question was one of construction, and in this case, having regard to the objects of the corporation and having regard also to the fact that the law knows of no distinction between infants of tender and of mature years, an infant was not eligible as a member.

Macbeth & Co. *v.* Chislett. [1910] A. C. 220 (H. L.)

Master and Servant—Seaman— Compensation— Employers and Workmen Act (1875) *S.* 13—*Employers' Liability Act* (1880) *S.* 8—*Merchant Shipping Act* (1854), *S.* 2.

The definition of a 'seaman' contained in the Merchant Shipping Act, 1854, S. 2, is not to be read into the Employers and Workmen Act, 1875.

A rigger, employed on board a ship in warping her from one berth to another across a large dock is not a "seaman" within the meaning of S. 13 of the Employers and Workmen Act, 1875, and therefore he is not precluded from suing under the Employers' Liability Act, 1880, in respect of an injury received while he was engaged in such work.

St. George Hanover Square (Rector and Churchwardens) *v.* Westminster Corporation.

[1910] A. C. 225 (H. L.)

Disused Burial Ground—Burial Act, 1857, *S.* 24—*London Government Act,* 1899, *Ss.* 4, 23—*Transfer of Powers and Duties—Exception of Ecclesiastical Powers and Duties.*

1. (1774) 1 C. and W. p. 220.

Land bought with ecclesiastical funds was by a private Act vested in the rector and Churchwardens of St. George, Hanover Square, for ever for a burial ground for the inhabitants of the parish. The rector and his successors were to have the burial fees. Under the direction of the vestry, the Rector and Churchwardens granted building leases of the unconsecrated part of the land. In 1854 the burial ground was closed by an Order in Council. As the building leases fell in and the buildings were pulled down the Rector and Churchwardens, under the direction of the vestry, granted fresh leases:—

Held, that the land was originally Church property and did not cease to be Church property by virtue of the Burial Act, 1857, and that on the passing of the London Government Act, 1899—which by S. 4 transferred the powers and duties of vestries to Borough Councils, but by S. 23 excepted any powers or duties relating to the affairs of the Church or any interest of a vestry in any Church property—the power and duty to direct the application of the proceeds of the leases did not pass to the Westminster Corporation as the Borough Council, but remained in the vestry under S. 24 of the Burial Act, 1857.

The question to what purposes the proceeds of the leases ought to be applied could not be determined in this litigation.

Hodgson v. West Stanley Colliery.

[1910] A. C. 229 (H. L.)

Employer and Workman—Compensation—Death caused by Accident—Claim by dependents—Earnings paid into Common Fund—Workmen's Compensation Act, 1906, *S.* 1.

A workman and his two sons were killed at the same time by the same accident, arising out of and in the course of their employment. The two sons were unmarried and lived at home and the wages of all three were paid into a common fund, out of which the whole family was maintained.

Held, that the widow and the younger children were dependent upon the earnings of all the three deceased men and were entitled to compensation calculated upon that basis. *Senior* v. *Fountains* [1] and *McLean* v. *Moss Bay Co.*,[2] overruled.

1. (1907) 2 K. B 563. 2. (1909) 2 K. B. 521

Clover, Clayton & Co., Ltd. *v.* Hughes.
[1910] A. C. 242 (H. L.).

Employer and Workman — Accident—Disease—Workmen's Compensation Act, 1906, *S.* 1.

A workman suffering from serious aneurism was employed in tightening a nut by a spanner when he suddenly fell down dead from rupture of the aneurism. The County Court Judge found upon conflicting evidence that death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal:—

Held, by Lord *Loreburn* L. C., and Lords *Macnaghten* and *Collins* (Lords *Atkinson* and *Shaw of Dunfermline* dissenting) that there was evidence to support the finding and that it was a case of "personal injury by accident arising out of and in the course of the employment" within the Workmen's Compensation Act, 1906.

Lecouturier *v.* Rey. [1910] A. C. 262 (H. L.).

Trade Mark—Effect of French law upon property in English Trade Marks—Passing off.

Where a foreign manufacture has acquired a reputation in England it is beyond the power of a foreign Court or foreign Legislature to prevent the manufacturers from availing themselves in England of the benefit of that reputation or to extend or communicate the benefit to any rival or competitor in the English market.

Carmichael *v.* Greenock Harbour Trustees.
[1910] A.C. 274 (H.L.).

Greenock Harbour Acts of 1880 *and* 1888—*Judicial Factor—Receiver—Power to increase Rates.*

By the Greenock Harbour Act, 1880, S. 70, "every application for a judicial factor under the provisions of this Act shall be made to the Sheriff, and on any such application the Sheriff may by order in writing, after hearing the parties, appoint some person to receive the whole or a competent part of the rates and duties and other revenues of the trust, until all the arrears of interest or of principal, as the case may be, * * * be fully paid."

The appellant, as judicial factor of the Greenock Harbour Trust, claimed to be entitled to demand for sugar shipped into or unshipped from vessels (foreign) at the port and Harbour of Greenock the rate of 1 *s.* 3 *d.* per ton being the maximum rate authorised by the Greenock Harbour Act, 1880. This rate was fixed by the appellant in opposition to the wishes of the respondents, the Greenock Harbour Trustees, who insisted that the rate should be only 10 *d.* per ton, the rate fixed by the respondents prior to the appointment of the appellant:—

Held, that the judicial factor was merely a receiver of the tolls and income of the undertaking and not its manager, and that he had no implied authority to increase or destroy the different sources of revenue.

Airdrie Magistrates *v.* Lanark County Council.

[1910] A.C. 286 (H.L.).

Stream—Pollution—Rivers Pollution Prevention Act, 1876 *Ss.* 3, 4.

The Rivers Pollution Prevention Act, 1876, makes it an offence under S. 3 to cause or permit any solid or liquid sewage matter and under S. 4 to cause or permit any poisonous, noxious or polluting liquid proceeding from any factory or manufacturing process to fall, flow or be carried into any stream.

Held, that a water-course which had been covered over, channelled and bottomed and was virtually mainly used as a drain or sewer, was a "stream" within the meaning of the Act.

Glasgow Navigation Co. *v.* Iron Ore Co.

[1910] A.C. 293 (H.L.).

Practice—Decision upon hypothetical state of facts—Shipping—Charter-Party.

The House of Lords will not give a decision upon a hypothetical state of facts, which does not represent the real contract between the parties.

Therefore where shipowners sued the charterers for demurrage under a charter-party, which contained a cesser clause which would have been a complete answer to the action, and the defendants, by agreement between the solicitors of the parties, undertook not to rely upon this clause, the House of Lords

declined to give a judgment in the case and the judgment of the Court below in favour of the defendants upon the merits stood.

Robinson *v.* Balmain New Ferry Co., Ltd.

[1910] A.C. 295 (P.C.)

Action for False Imprisonment—Contract as to entry on and exit from Wharf—Unreasonable conduct of plaintiff.

In an action for damages for assault and false imprisonment it appeared that the plaintiff had contracted with the defendants to enter their wharf and stay there till the boat should start and then be taken by the boat to the other side. No breach of the defendant's undertaking was alleged, but the plaintiff after entry changed his mind and desired to effect an exit from their wharf without payment of the prescribed toll for exit, and was for a time forcibly prevented.

Held, that he ought to have been non-suited. The toll imposed was reasonable and the defendants were entitled to resist a forcible evasion of it.

Hamilton Gas Co. *v.* Hamilton Corporation.

[1910] A. C. 300 (P. C.).

Gas Company—Purchase by Corporation under Statutory powers—Price—Gasworks and plant—whether a going concern or works and plant in situ.

Under an Act for the establishment of gasworks at *H*, the Corporation of *H* were entitled, in the events which happened, "to purchase the gas-works and plant at a price to be determined by arbitration."

Held, that the price should be the commercial value of the gas works and plant as a going concern, taking all the surrounding circumstances into consideration, not merely the value of the gas works and plant *in situ*.

Toronto Corporation *v.* Toronto Railway.

[1910] A. C. 312 (P. C.).

Ontario Act 8 *Edw.* 7, *C.* 112, *S.* 1—*Construction and effect.*

An order in Council in pursuance of the judgment of their Lordships in [1907] A. C. 315 ordered that subject to certain conditions contained in their agreement it was for the respondents

and not the appellants to determine what new lines should be laid down on streets within the city of Toronto.

Thereafter an order was made by the Ontario Railway and Municipal Board that the respondents do construct between ten and fifteen additional miles of single track, and the company selected certain streets for that purpose. Subsequently the Court of Appeal for Ontario affirmed a decision of the said Board that the company had the right to select:—

Held, that the judgment in [1907] A. C. 315 was perfectly clear and that the order in Council thereon was unaffected by Ontario Act, 8 Edw. 7, C. 112, S. 1.

Per *Lord Macnaghten*:—The argument on the part of the appellants appears to be mainly founded on a short-hand note of some extracts from the speeches delivered by Counsel of the former case, a line of argument which their Lordships are not prepared to follow or disposed to countenance.

Jones *v.* North Vancouver Land Improvement Co.
[1910] A. C. 317 (P. C.).

Company—Shares—Forfeiture for non-payment of calls—Director—Notice.

A director of a company who has been a director from the foundation of the company, and has taken an active part in the management, and was himself present at a meeting of the directors at which a resolution was passed declaring certain shares, in which he was beneficially interested, forfeited for non-payment of calls, and himself supported such resolution, will not be allowed to set up that the directors were illegally appointed, so that everything done by them was void *ab initio* or that notice of his own acts was not legally served upon him.

Barton *v.* Lempriere. [1910] A. C. 330 (P. C.).

Law of New South Wales—Conditional purchase of land—Reservation of gold to Crown—Title—Crown Lands Alienation Act, 1861, *Ss.* 13, 14.

Land held under a "conditional purchase" was sold "free from incumbrances, but subject to the reservations mentioned in the schedule, and to the local laws and regulations affecting the same." The schedule mentioned "gold reserved to the Crown."

Held, that the two branches of the sentence were not intended to be mutually exclusive, and that it meant " subject to the reservation of gold, and to the provisions, whether in the nature of reservations or not, of the local laws and regulations.

Scrymgeour Wedderburn *v*. Earl of Lauderdale.
[1910] A. C. 342 (H. L).

Dignity—Jurisdiction—Non-alienability of office of Standard Bearer of Scotland—Sale of Offices—Prescription—Scots Act 1455, *C*. 44.

Held, that all heritable offices are not adjudgable, and that the office or dignity, of Hereditary Royal Standard Bearer of Scotland, being vested in the appellant's family by right of blood could not be carried by any decree of the Court of Session nor adjudged nor be lost to the appellant's family except under circumstances which had not occurred.

Held, therefore, that the respondent the Earl of Lauderdale had no right or title to the office or dignity of Hereditary Royal Standard Bearer of Scotland.

Greville *v*. Parker. [1910] A. C. 335 (P. C.)

Law of New Zealand—Lease—Breach of covenant—Right to renewal of Lease—Specific performance—Property Law Act, 1908, S. 94 *Sub-S*. 1.

The New Zealand Property Law Act, 1908, does not enable the Court to give relief against failure to perform a condition precedent. Therefore where a lease gave the tenant the option of a renewal of the lease upon the expiration of the term originally granted, upon his performing and fulfilling all the covenants contained in the lease up to the expiration of the term, and the tenant gave notice of his desire to have a renewal, but the Court found that he had committed breaches of the covenants:

Held, that the tenant was not entitled to specific performance of the agreement to renew upon making compensation in money for any damages caused by his breaches of covenant.

JOTTINGS AND CUTTINGS.

Oratory and the Lawyer.—It is the fashion nowadays with many lawyers and journals to cast ridicule upon oratory, not merely upon particular specimens but upon oratory as an art, and to deprecate its usefulness to the lawyer. Part of this hostility can be ascribed to the human disposition to kick the under dog. For it cannot be denied that the power of oratory as a weapon of popular warfare has greatly decreased within the last generation. This has been brought about by a variety of causes. First of all, is the increased distribution of the newspaper. The daily paper, by its wide dissemination of information of all sorts, has rendered the reader less hungry for oratorical discussion, and has, at the same time, afforded to him wishing to present any matter to the public an audience more numerous than the fame of any orator could collect or any human voice reach. Another cause is to be found in the absence in our time of any of those overshadowing national questions, such as produced Demosthenes and Cicero in the expiring days of Grecian and Roman freedom; Burke, the Pitts, Fox, Sheridan and Erskine in the morning of the modern British Empire; the Adamses, Madison and Randolph in the revolutionary, and Webster, Clay, Colhoun and Hayne in the antebellum period in our own country. Orators are subject to that law which operates alike upon all, and will permit nothing to ripen into perfect development until the conditions of the times have created a need for it. Great crises are the breeding times for orators, and as we have had none of supreme importance since the settlement of the slavery controversy, the effect is seen in the absence of public speakers of the first ability. Closely connected with this cause is a third, which is the commercialism of the present day and the consequent decay of that high, idealistic responsiveness wherein lies the peculiar power of the orator. A great speech is almost as much a creation of the audience as of the speaker. A people whose every thought is intent upon the accumulation of individual wealth are not open either to appeals to lofty sentiment or to the presentation of broad schemes of national or racial policy.

Though these reasons may explain the decay of the influence of the orator, they afford no justification to those who affect

to treat the art of oratory with contempt. For though books and newspapers be ever so common, the printed page can never supply the place of the human speech, aided and enforced by gesture and facial expression, and, above all, inspirited by the personality of an earnest man who believes in his message, and is eager to impart it to his hearers. It is said of Erskine, Henry Clay and Sergeant Prentiss, that those who heard them speak would turn with impatience from the printed reports of their speeches. These reports may have been accurate as verbal reports; and yet they were not the speeches.

But whatever may be said of the utility of oratorical skill to the modern preacher or public man, as for the lawyer the multiplication of books and papers can never render it of less value to him. Newspapers cannot discuss his points of law before the Judge, nor argue his questions of fact to the Jury. He must conduct his own case quite as much as his brother of past ages. Nor has he less opportunity or less incentive than in former times. Upon his presentation still depend the dearest rights of those who are forced to rely upon his ability and skill in defending their lives, liberties and property. And surely these are not of less value now than in the past. In the lawyer's work of asserting human rights in the ultimate tribunals forensic skill has always been accounted a valuable weapon. But with recent years it has become fashionable with many lawyers and legal journals to ridicule all oratorical attainments as valuable only to the bombastic holiday speaker.

Part of this disposition is no doubt to be ascribed to a short-sighted practicality, which over reaches itself, a philistinism which despises all that is excellent or beautiful in art, and can brook no thought if it be not expressed in the language of the counting-house.

Another—and perhaps a more common—cause lies in a loose use of the word oratory, due either to carelessness in speech or ignorance of the true meaning of the word. Many writers, and even some lawyers, seem to think that oratory means only windy holiday and schoolboy speeches, or the high flown peroration, often tacked on without logical connection, after the main speech is ended. To them the word is synonymous with irrelevancy and extravagance. Only recenty a judge of the Supreme

Court of New York was quoted as advising a law class to "eschew eloquence and stick to the facts." As if oratory and eloquence were something different from the facts with which they had nothing to do!

"Oratory," says Quintilian (15, Inst., 38), "is the art of speaking well." Prof. Webster defines it as "The art of an orator, the art of public speaking in an eloquent or effective manner; the exercise of rhetorical skill in oral discourse; eloquence." And when we examine the speeches of famous advocates we find that they produced their effects not by wandering from the facts but by marshalling and correlating them. Cicero in the Orations against Verres brings forward instance after instance of the depredations of the Governor of Sicily. Erskine did not procure the acquittal of Lord George Gordon, Horne Tooke or Thomas Hardy, by appeals tothe Jury to disregard the facts, but by using the facts to demonstrate that the accused were not guilty. Take also the celebrated defence of Judge Wilkinson by Sergeant Prentiss. With marvellous skill he passes in review the facts, thereby establishing the innocence of his client.

Burke and Sheridan, one the most splendid, the other the most fervid of orators, in their speeches against Hastings, denounce him in the most bitter terms,but always upon the evidence before the Court. They do not, it is true, confine themselves to a mere recapitulation of the testimony. If an advocate did so there would be no use in wasting time to hear him, for the triers could depend upon their own recollection, or in the case of a Jury they would have the assistance of the Judge's charge. But a bare recital of the testimony favourable to his cause does not comprehend the duty of the advocate. He must go further and explain the relation of the circumstances of the case to each other, as well as their relation to extraneous facts. He must examine every bit of testimony, and point out its significance in the light of the whole case. The facts in his case are not things by themselves, unrelated to other facts of life. His case is not isolated in the world of experience. And before a just and proper judgment can be reached, his cause must be weighed according to standards of conduct in general. To thus correlate the facts of a case, and explain their meaning in relation to one

another, and to human experience in general—to do this well, is oratory. And the lawyer who can do this will not, in the argument of questions feel at loss if he cannot find an exact precedent. He will study the principles of the law in order to ascertain its aim.Then he will examine the principles ofphilosophy, of sociology, of political economy, to find whether a given decision would accomplish the end which the law has set for itself. And when he states a proposition he will not be forced to base it upon his bare assertion, but can establish it by reasoning and enforce and illustrate it with the facts of history and literature.

Erskine became Lord Chancellor of England ; yet his fame rests upon his successful, assertion of individual liberty in the State Trials. And as he was defending rights under the English constitution he discussed freely its history and its principles. Nor did he refrain from discussing questions of policy. Nor were these excursions irrelevant or merely idealistic. To his speech in support of a new trial for the Dean of St. Asaph it is reported that "old black letter lawyers and polished statesmen alike listened with delight." And the principles he asserted soon found their way into the laws of England. His theory of the rights of the jury in libel cases was adopted by Act of Parliament, and to him, more than to any other man, is due the honor of having for ever given the death-blow to constructive treasons. No mean achievement this for any man. The need for such lawyers has not passed, and never will pass under a free government. Our own country is especially fruitful of legal questions which are also largely economic and sociological. These questions cannot be settled by newspapers and pamphlets. They must be argued out in the Courts, and in arguing them, twice armed is he who, in addition to a knowledge of the law, possesses "the art of speaking well."—*The Green Bag.*

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The Late Chief Justice Fuller.—Chief Justice Fuller, of the United States Supreme Court, died at Bar Harbour, Maine, on July 4. Melville Weston Fuller, who was born in Augusta, Maine, in 1833, entered the legal profession as soon as he had graduated at Bowdoin College. For thirty three years he practised in Chicago, gradually making his way to the top of his profession. He

took an active part in both State and Federal politics. In 1888—eight years after retiring from the political world—he was nominated by President Cleveland to be Chief Justice of the United States, in succession to Mr. Morrison R. Waite. When, on July 30, 1888, his nomination was confirmed by the Senate, he was, with one exception, the youngest member of the Supreme Court, over which he was to preside for twenty-two years. In the line of eminent Judges who have presided over the Supreme Court of the United States (says the *Times*), Chief Justice Fuller will perhaps hardly stand very high. He was not the peer of Marshall or Taney, or even Chase, and his judgments sometimes compared unfavourably in point of learning and acuteness with those of certain of the puisne members of his Court. Lawyers esteemed more a discussion of legal principles by, say, Mr. Justice Brewer or Mr. Justice Holmes than by Chief Justice Fuller * * All the same, without much brilliancy of parts and devoid of some of the gifts going to make a very great lawyer, he commanded universal respect, and maintained the best traditions of his office. Ii will be difficult to find a successor likely to be more tactful and to commit fewer mistakes.—*The Law Journal.*

Acknowledgments.

We beg to acknowledge receipt of the following publications :—

Allahabad Law Journal for	July 1910
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do
Case and Comment	Do.
Central Law Journal	Do
Chicago Legal News	Do
Criminal Law Journal	Do.
Green Bag	Do.
Harvard Law Review	Do.
Hindustan Review	Do.
Kathiawar Law Reports	Do.
Law Magazine and Review	Do.
Law Notes	Do.
Law Students' Helper	Do.
Law Students' Journal	Do.
Michigan Law Review	Do.
Police Service Magazine	Do
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do.